SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-491

THOMAS LEE LIVINGSTON,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 3

Constitutional Provisions, Statutes and Regulations Involved 3

Statement of the Case 3

Proceedings Below 6

REASONS FOR GRANTING THE WRIT

I. The decision below is in conflict with the decision of this Court in *Bartchy* v. *United States*, 319 U.S. 484 (1942) 9

CONCLUSION 12

APPENDIX:

Opinion of the Court of Appeals en Banc, Remanding Petitioner's Case to the District Court 1a

Opinion of the District Court Adjudging Petitioner Guilty 9a

Opinion of the District Court Denying Petitioner's Post-Trial Motions 19a

PAGE

Judgment of the Court of Appeals Affirming Petitioner's Conviction 22a

Order of the Court of Appeals Denying Petitioner a Rehearing en Banc 24a

Local Board's Minutes of Action 25a

Letter dated May 17, 1966 ..... 27a

Letter dated December 29, 1966 ..... 28a

Letter dated January 4, 1967 ..... 29a

Letter dated March 4, 1967 ..... 30a

Envelope from Selective Service—returned, address unknown 31a

Induction Notice (SSS Form 252), dated April 23, 1968 ..... 32a

Letter stamped July 31, 1968 ..... 33a

Letter dated July 31, 1968 ..... 34a

Current Information Questionnaire (SSS Form 127), dated July 31, 1968 ..... 35a

Envelope from Selective Service—returned, address unknown 36a

Delinquent Registrant Report (SSS Form 301), dated June 6, 1968 ..... 37a

Extracts From Testimony 39a

Table of Authorities

PAGE

Cases:

Bartchy v. United States, 319 U.S. 484 (1942) 9, 10, 11
Bradley v. Laird, 449 F.2d 898 (10th Cir. 1971) 12

Davis v. United States, No. 72-1454 (Oct. Term 1972) 12

Gutknecht v. United States, 396 U.S. 205 (1970) 12

Lambert v. California, 355 U.S. 225 (1957) 11

United States v. Booth, 454 F.2d 318 (6th Cir. 1972) .. 11
United States v. Bowen, 414 F.2d 1268 (3rd Cir. 1969) 9
United States v. Dudley, 451 F.2d 1300 (6th Cir. 1971) 12
United States v. Ebey, 424 F.2d 376 (10th Cir. 1970) .. 10
United States v. Figurell, 462 F.2d 1080 (3rd Cir. 1972) 11
United States v. Lake, —— F.2d ——, No. 72-1942 (9th Cir. May 29, 1973) 10
United States v. Raab, 394 F.2d 230 (3rd Cir. 1968) 11
United States v. Simmons, 476 F.2d 33 (9th Cir. 1973) 9
United States v. Smith, 308 F. Supp. 1262 (S.D.N.Y. 1969) 9
United States v. Williams, 421 F.2d 600 (10th Cir. 1970) 11

Venus v. United States, 368 U.S. 345 (1961), *aff'g* 287 F.2d 304 (9th Cir. 1960) 10, 11

Ward v. United States, 344 U.S. 924 (1953), *rev'g* 195 F.2d 441 (9th Cir. 1952) 10, 11

PAGE

Constitutional Provisions:

United States Constitution
Fifth Amendment 3

Regulations:

32 C.F.R. §1624 4
32 C.F.R. §1625 4
32 C.F.R. §1641.3 (1971) 3, 9, 11

Rule:

F. R. Crim. P. 52(b) 6

Statutes:

50 U.S.C. App. §451 *et seq.* 3

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THOMAS LEE LIVINGSTON,

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—v.—

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 16, 1973.

Opinions Below

The first opinion of the Court of Appeals, *en banc,* remanding petitioner's case to the district court is reported at 459 F.2d 797 and is set forth in the Appendix, *infra* at pp. 1a-8a.

The opinion of the district court following that remand, again adjudging petitioner guilty is unreported and is set forth in the Appendix, *infra,* at pp. 9a-18a. The opinion of the district court denying petitioner's post-trial motions for acquittal, arrest of judgment and a new trial are un-

reported and are set out in the Appendix, *infra,* at pp. 19a-21a. The judgment of the Court of Appeals affirming, without opinion, petitioner's conviction is unreported and is set forth in the Appendix, *infra,* at pp. 22a-23a. The order of the Court of Appeals denying petitioner a rehearing *en banc* is unreported and is set forth in the Appendix, *infra,* at p. 24a.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

On June 13, 1973, an application for an extension of time in which to file a petition for certiorari, was received by the Clerk of the Court, but returned as untimely filed. The grounds for the anticipated untimely filing of the instant petition were set forth therein and the original of the application for the extension of time will be supplied to the Court upon request. The late filing of the instant petition is, it is respectfully submitted, not a jurisdictional defect. See *Schact* v. *United States,* 398 U.S. 58, 64-65 (1970); *Taglianetti* v. *United States,* 394 U.S. 316, n. 1 (1969).

Question Presented

1. Whether the Court below erred in holding petitioner guilty of willfully failing to report for induction.

Constitutional Provisions, Statutes and Regulations Involved

This case involves the Fifth Amendment to the Constitution of the United States; the Selective Service Acts of 1967 and 1970 (50 U.S.C. App. §451, *et seq.*) and 32 C.F.R. §1641.3 (1971).

Statement of the Case

Petitioner registered with Selective Service Local Board No. 173, York, Pennsylvania on March 13, 1962. He gave as his address 809 Center Street, Mt. Wolf, York County, Pennsylvania. As late as May 19, 1966, petitioner had informed his local board that this continued to remain his address (27a).

Between March 3, 1964 and May 10, 1966, petitioner was the subject of various administrative actions by his draft board, not here relevant, which resulted in the issuance to him of an induction order to which he did not respond. Prosecution was declined by the United States Attorney for the Middle District of Pennsylvania (28a, 29a).

Following these events, on January 17, 1967, petitioner was classified 2-A (occupational deferment) by reason of his employment with VISTA (26a).

On March 4, 1967, petitioner notified his local board that his address had changed to 3700 W. Grand Avenue, Chicago, Illinois, as a result of a transfer of his working assignment by VISTA (30a).

His term of service with VISTA having ended, petitioner was reclassified 1-A (available for service) on March 14, 1968 (26a). A Notice of Classification to that effect (SSS Form 110) was mailed to petitioner on March 22, 1968 to the "3700 W. Grand Avenue Chicago" address but this notice (31a) was returned to the local board on March 25, 1968 stamped "Addressee unknown", and bore the handwritten legend "address not here", "address not known" (31a). On April 2, 1968, the Notice of Classification of March 22, 1968 was remailed to petitioner's Mt. Wolf, Pennsylvania, address. The envelope and its contents were not returned (31a).

Thereafter, having received no notice of appeal from petitioner or request for a personal appearance,[1] the local board, on April 23, 1968, mailed to petitioner an Order to Report for Induction (SSS Form 252), on May 16, 1968 (26a, 32a). For some unexplained reason, however, the induction order was mailed to the "3700 W. Grand Avenue" address in Chicago (32a) despite the local board's prior knowledge that petitioner no longer resided at that address.

Petitioner testified at trial, without challenge, that he never received the induction order (48a).

On July 31, 1968, petitioner's local board received a letter from him containing the innocuous request that he be sent a new set of draft cards since he had lost his (33a).

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[1] See 32 C.F.R. Parts 1624 and 1625.

Petitioner also informed the board of his new address: "4431 n. Clifton Ave., Chicago, Illinois."[2]

In response to petitioner's letter, the local board's executive secretary prepared a letter to petitioner, dated July 31, 1968, which illogically informed him only of his failure to report for induction in 1966 for which prosecution had long before been declined—a fact which petitioner already knew (34a). No mention of the April, 1968 order, of which petitioner was unknowingly in default, was made. More importantly, while the letterhead address of the board's July 31st letter was typed out to "4431 Clifton Avenue," the envelope in which the letter, and an accompanying "Current Information Questionnaire," were sent to petitioner, was *misaddressed by the secretary* to "4441" North Clifton Avenue (36a). This letter was thus returned, "Addressee unknown".

On June 6, 1968, petitioner was reported for prosecution to the United States Attorney for the Middle District of Pennsylvania for violating the April, 1968 induction order (37a-38a).

Admittedly, no attempt was ever made by the Selective Service System to remail the April 23, 1968 induction order to either petitioner's Mt. Wolf, Pennsylvania address or the residence at 4431 North Clifton Avenue, at which petitioner could have received it. Nor was any effort made to prepare a letter similar to the one of July 31, 1968 properly informing him of the outstanding April, 1968

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[2] A typographical error in petitioner's letter indicates that the "3" in "4431" was typed over an erroneously typed "4", making it difficult to determine without close scrutiny whether the North Clifton Avenue address should be "4431" or "4441".

induction order or to mail such a letter to petitioner's correct address.[3]

Proceedings Below

Petitioner was indicted on September 16, 1969 for his failure to report for induction on May 16, 1968. He was convicted of that charge on September 22, 1970 on a general finding of guilty after a non-jury trial. No opinion, findings of fact or conclusions of law were filed by the district judge.

An appeal to Third Circuit was taken and following argument to a panel and then reargument *en banc,* the judgment of conviction was vacated and the case remanded to allow the district judge to make findings of fact and state conclusions of law. See *United States* v. *Livingston,* 459 F.2d 797 (3rd Cir. 1972) (1a).

On July 24, 1972, the trial court filed an opinion (9a), again finding petitioner guilty.

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[3] The trial court justified its finding that petitioner had received the April 28, 1968 induction order by compounding an obvious administrative error made by the board's secretary on page 2 of the Delinquent Registrant Report (SSS Form 301) (38a). The clerk had there typed, "April 2, 1968—Induction Notice, SSS Form 252 was remailed to original address: 809 Center Street, Mt. Wolf Pa. 17347".

Obviously however, it was not the induction order that had been remailed on April 2, 1968 to petitioner but rather it was the Notice of Classification which had been previously returned from the 3700 Grand Avenue address. It is logically impossible that an induction order not prepared until April 28, 1968 could be "remailed" on April 2, 1968.

The district court, when directed to this obvious impossibility, merely characterized it as "at best . . . an error which goes to credibility" (20a). No other evidence proving that the April 28, 1968 induction order had been mailed to Mt. Wolf, Pennsylvania, was introduced at trial.

With all due respect, petitioner submits that the trial court committed plain error in this crucial regard under F.R. Cr. P. 52(b).

Petitioner's motions to set aside the verdict were also denied (19a).

At the trial, the government's chief witness was the clerk of petitioner's local board. In response to defense counsel's question as to why, in the letter of July 31, 1968 (34a), she had not informed petitioner that he was in default of the May 16, 1968, induction date she responded,

> A. I can't answer that.

Further questioning followed:

> Q. Didn't you have a suspicion maybe he didn't get the mail since the envelope [which had contained the induction order] had come back "address unknown?" A. I can't answer that.
>
> Q. After a man fails to report for induction do you ever send him additional orders to give him another chance to submit? A. We give him another chance *sometimes*, yes (emphasis added) (40a).
>
> * * * * *
>
> Q. Is there anything indicating that he was aware he was supposed to report in 1968? A. No. . . . (41a).
>
> * * * * *
>
> Q. Now, Mrs. Grove [the local board clerk] what kinds of considerations go into the decision as to whether or not you send out an additional order to report for induction after a man has failed to report? You say you do it sometimes? A. Well, we make every effort to contact his previous employer or his parents, and sometimes they give us a lead and we give them another chance (43a).
>
> * * * * *

> **Q. After he sent in the new current information questionnaire, again giving his address, did you make any effort to give him another chance by sending him another notice of induction?**
>
> • • • • •
>
> **A. . . . no (44a).**

In contrast, petitioner took the stand and testified to his whereabouts in April and May of 1968:

> Q. Mr. Livingston, in 1968, did you ever receive a notice to report for induction? A. No, I didn't.
>
> Q. Were you ever made aware you were to report for induction by anyone? A. No.
>
> Q. You submitted an address in Chicago to your local board in 1967, is that correct? A. Yes sir.
>
> Q. Were you there at all times? A. Most of the time, yes. I was living there then.
>
> Q. Did you customarily receive your mail there? A. Yes.
>
> • • • • •
>
> Q. Mr. Livingston, where did you say you were living in Chicago in 1968? A. In 1968 I was uptown.
>
> Q. Uptown? A. Uptown.
>
> Q. Do you recall the address? A. On Clifton Avenue. It was the 4400 block. I don't know the exact number (48a-49a).

The trial court's opinions denying petitioner acquittal rested primarily on the premise that,

> To allow the defendant to fail to report an address change and then rely upon the failure as an excuse to avoid induction would be to reward the doubly delinquent (17a).

The Third Circuit affirmed in an order without opinion (22a).

REASONS FOR GRANTING THE WRIT

I.

The decision below is in conflict with the decision of this Court in *Bartchy* v. *United States*, 319 U.S. 484 (1942).

The government in the instant case has, at best, indicted petitioner and obtained his conviction for the wrong offense.

32 C.F.R. §1641.3, at all times relevant hereto, provided that,

> It shall be the duty of each registrant to keep his local board advised of the address where mail will reach him. The mailing of any order, notice or blank form by the local board shall constitute notice to him of the contents of the communication, *whether he actually receives it or not.* (Emphasis added.)

While the italicized portion of the regulation has been held to be of doubtful constitutionality, see *United States* v. *Bowen*, 414 F.2d 1268 (3rd Cir. 1969); *United States* v. *Simmons*, 476 F.2d 33 (9th Cir. 1973); *United States* v. *Smith*, 308 F. Supp. 1262 (S.D.N.Y. 1969), this Court, in *Bartchy* v. *United States*, 319 U.S. 484 (1942), held that the duty imposed upon the registrant to supply his local board with an address where the mail will reach him is satisfied,

> . . . when the registrant in good faith, provides a chain of forwarding addresses by which mail sent to the address which if furnished the board, may be by

> the registrant reasonably expected to come into his hands in time for compliance. 319 U.S. at 489.[4]

The uncontradicted evidence adduced at the trial below shows that the only document ever presumably received by petitioner during the time period relevant to the instant prosecution was the March 22, 1968 Notice of Classification (SSS Form 110) which had been remailed to petitioner's Mt. Wolf, Pennsylvania address, following its return from the "3700 W. Grand Avenue" Chicago address. This Notice of Classification, remailed April 2, 1968 (31a) was not and could not have been an induction order.

The induction order of April 23, 1968 was mailed to an address in Chicago at which the board admittedly knew petitioner no longer resided.

The letter of July 31, 1968 not only failed to inform petitioner of his delinquency in reference to the April, 1968 induction order but, additionally, it was misaddressed by the local board so that it never reached the new Chicago address which pettiioner had, in good faith, informed the board of (33a).

Finally, no attempt was ever made to inform petitioner of his unknowing default of the April 28, 1968 induction order at his proper North Clifton Avenue, Chicago address or his Mt. Wolf, Pennsylvania address (44a).

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[4] See also *Ward* v. *United States*, 344 U.S. 924 (1953) rev'g 195 F.2d 441 (9th Cir. 1952); *United States* v. *Ebey*, 424 F.2d 376 (10th Cir. 1970). Compare, *Venus* v. *United States*, 368 U.S. 345 (1961), aff'g 287 F.2d 304 (9th Cir. 1960).

In the instant case petitioner was indicted for noncompliance with an induction order which the uncontradicted evidence showed he never received. The district court's disavowal (17a) of any reliance on the seemingly irrebutable presumption created by the italicized portion of the regulation, *supra*, means little if the court merely substituted its own illogical presumption of receipt. See, *United States* v. *Lake*, —— F.2d ——, No. 72-1942 (9th Cir. May 29, 1973).

Admittedly, while petitioner's nonreceipt of an induction order may have been the result of his non-compliance with the duty imposed upon him by 32 C.F.R. §1641.3 to keep his board advised of an address where mail might reach him, proof of this fact, which the government sought to adduce, literally negates the crime charged in the indictment, which is a totally separate offense. *United States* v. *Williams*, 421 F.2d 600 (10th Cir. 1970); cf. *Bartchy* v. *United States, supra* at 488.

In order to obtain such a conviction the government must prove what admittedly it could not—that the petitioner had knowledge of his duty to report and that he intended to evade that duty. See, *United States* v. *Figurell*, 462 F.2d 1080 (3rd Cir. 1972); *United States* v. *Raab*, 394 F.2d 230 (3rd Cir. 1968). Cf. *Lambert* v. *California*, 355 U.S. 225, 229 (1957).

The trial court's failure to perceive this distinction thus led to its erroneous observation that, "To allow the defendant to fail to report an address change, [and] then rely on the failure as an excuse to avoid induction would be to reward the doubly delinquent" (17a). The answer of course is not to reward the doubly delinquent but to indict them for the proper offense and not to transmute evidence showing a failure to supply an address (thereby preventing receipt of an induction order) into a conviction for a willful failure to report for induction.[5]

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[5] Compare, e.g., *Bartchy*, *Ward*, and *Venus*, all *supra*, in which the proper offense was charged. It is to be noted in *Bartchy, supra*, that the petitioner there was acquitted, and properly so, of the induction count, since he had not received the order in question, although the reason for the failure to receive the order was charged as the basis for the second, or "address" count. See also e.g., *United States* v. *Booth*, 454 F.2d 318 (6th Cir. 1972), in which, despite two indictments spanning five counts, no conviction for a willful failure to report for induction could be had.

CONCLUSION

For all of the foregoing reasons the petition for certiorari should be granted and the conviction reversed.[6]

Respectfully submitted,

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[6] Should certiorari be granted, petitioner also preserves the question of whether or not his induction order was issued in violation of this court's holding in *Gutknecht* v. *United States*, 396 U.S. 205 (1970). In a letter to the Pennsylvania State Director of Selective Service, dated January 4, 1967, the United States Attorney for the Middle District of Pennsylvania, after having apparently agreed to decline prosecution of petitioner, suggested to the State Director that following the expiration of petitioner's year in VISTA "he then immediately be ordered for induction. . . ." (29a).

Petitioner submits that such a suggestion rebuts the presumption that petitioner's induction was not accelerated, and the courts below erred in not requiring the government to sustain its burden of proving, beyond a reasonable doubt, that it was not. See, *United States* v. *Dudley*, 451 F.2d 1300 (6th Cir., 1971); *Bradley* v. *Laird*, 449 F.2d 898 (10th Cir. 1971). See also *Davis* v. *United States*, No. 72-1454, Oct. Term 1972, *cert. pending*, in which this issue is also presented in a similar context.

[*] Attorneys for petitioner gratefully acknowledge the assistance of Mr. Edwin J. Oppenheimer, law clerk, New York Civil Liberties Union.